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Letter dated 20 September 2006 from the Permanent Representative of the Republic of Moldova to the United Nations addressed to the Secretary-General

Upon instructions from my Government, I have the honour to transmit herewith the executive summary of the report of the New York City Bar Association entitled "Thawing a frozen conflict: legal aspects of the separatist crisis in Moldova" (see annex). The report was issued in May 2006 by the Committee on European Affairs of the New York City Bar Association, as a result of a year-long study that included sending a mission to the area and meeting with the leadership of both the Republic of Moldova and the so-called Transnistrian Moldovan Republic, as well as representatives of the Russian Federation, Ukraine, Romania and the United States State Department. The study concludes that Russia's support of the separatist regime in Moldova's breakaway region of Transnistria leads to a serious claim that Russia is violating international law and illegally interfering in the internal affairs of Moldova.

I would like to add that, for those interested in looking through it, the whole report can be found in the website of the New York City Bar Association at http://www.nycbar.org.

I should be grateful if the present letter and its annex could be circulated as a document of the General Assembly, under item 27 of the agenda of the sixty-first session.

(Signed) Alexei **Tulbure**
Ambassador
Permanent Representative

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Annex to the letter dated 20 September 2006 from the Permanent Representative of the Republic of Moldova to the United Nations addressed to the Secretary-General

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

THAWING A FROZEN CONFLICT: LEGAL ASPECTS OF THE SEPARATIST CRISIS IN MOLDOVA

EXECUTIVE SUMMARY

THE SPECIAL COMMITTEE ON EUROPEAN AFFAIRS
Mission to Moldova

Introduction

Moldova is the poorest country in Europe and it is enmeshed in a seemingly intractable separatist conflict involving ethnic tensions, Russian troops, Soviet-era arms stockpiles, smuggling, money-laundering, and corruption. Bordering Romania and Ukraine, with a majority of ethnic Romanians, it is a country that has been largely overlooked by the West.[1] This report examines the key legal issues of this "frozen" conflict and assesses the legal or quasi-legal arguments made by the Government of Moldova and the separatists.

At issue is who should control a strip of land nestled between the Dniestr River and the border of Ukraine. Variously called Transnistria, Trans-Dniester and, by Russian speakers, Pridnestrov'ia, this region is less than 30 kilometers wide, with 4,118 square kilometers in total area, making it roughly the size of Rhode Island. Transnistria has a population of approximately 580,000, while the rest of Moldova has 3.36 million inhabitants. Nonetheless, Transnistria contains Moldova's key industrial infrastructure, power plants, and, importantly, a significant stockpile of Soviet-era arms. Since 1994, it has been under the effective control of a separatist regime that calls itself the Transnistrian Moldovan Republic ("TMR").

In late May 2005 the Association of the Bar of the City of New York (the "NY City Bar"), through its Special Committee on European Affairs (the "Committee") sent a legal assessment team (the "Mission") to the Republic of Moldova, including Transnistria. The Mission consisted of Barrington D. Parker, Jr., a United States Circuit Court Judge in the Second Circuit, Robert Abrams, a partner at Stroock & Stroock & Lavan LLP and former Attorney General of the State of New York, Elizabeth Defeis, Professor of Law and former Dean of Seton Hall University Law School, and Christopher J. Borgen, Assistant Professor of Law at St. John's University School of Law. It was led by Mark A. Meyer, a member of

[1] The Soviets, however, labeled this population as ethnically "Moldovan," and asserted that they were not ethnically Romanian. The USSR also called the Romanian language "Moldovan," and underscored this by outlawing the use of the Latin alphabet and requiring the use of Cyrillic letters. Although the reason for this nomenclature was political, rather than ethno-linguistic, it was carried over by the current Moldovan government after independence.

Herzfeld & Rubin, P.C., and the Chair of the Committee. Professor Borgen is the principal author of the report.

The Mission met with the key policy leaders in Moldova and in the breakaway region, including the President of Moldova and the leader of the Transnistrian separatists, and has completed the first independent analysis of the legal issues involved in the Transnistrian crisis. Beholden to none of the stakeholders, the NY City Bar is able to consider these issues from an objective standpoint. One should note that the NY City Bar's work historically has not been confined to New York. In fact, the Transnistria mission is not the first foreign mission by a committee of the Association. Over the past twenty-five years, the Association has conducted a number of missions to places as diverse as Cuba, Singapore, Malaysia, Turkey, Hong Kong, Argentina, Uganda, Northern Ireland, and, most recently, India. In addition, the Association has worked with bar organizations in the Czech Republic and Kyrgyzstan to bolster the independence of the bar and judiciary. Perhaps due to this historical involvement in international law, the various interested parties, including the governments of Moldova, Russia, Romania, Ukraine, and the United States, as well as the leadership of Transnistria, assisted the Mission by making government representatives, policymakers and experts available for interview.[2]

Report Summary

This report considers three main legal issues: (*a*) whether the TMR has a right under international law to autonomy or possibly sovereignty; (*b*) what the legal concerns are regarding the transfer of property located in Transnistria by the TMR leadership; and, (*c*) what role "third-party" States have in the ongoing conflict and, in particular, the international legal implications of Russian economic pressure and military presence in the TMR.

The Status of the TMR under International Law

The central question to this report concerns the status of the TMR under international law and, in particular, the evaluation of claims by Transnistrian leaders that the TMR has a legal right either to autonomy within Moldova or to secede. We found neither claim persuasive and conclude that the TMR is best characterized as a "*de facto* regime."

No Right to Autonomy.

First, under international law there is no "right" to fiscal or governmental autonomy within a state. While the TMR leadership may make political arguments that one may or may not find persuasive, we did not find a legal basis for a claim of autonomy. The two strongest quasi-legal arguments in favor of autonomy are: (*a*) that due to the denunciation by the

[2] See the Annex to this Executive Summary for a partial list of interviews.

USSR of the Molotov–Ribbentrop Pact, which had established the modern boundaries of Moldova. Transnistria should revert to an autonomous state; and, (*b*) self-determination as a basis for autonomy.

The denunciation argument is a chimera. Simply denouncing a treaty does not revert the political system to the *status quo ante*; it merely means that the treaty will not be in force going forward. This is especially true in treaties that include boundary delimitation provisions.

The second argument made by the Transnistrians, linking autonomy with the right of self-determination, opens up numerous complex issues in public international law. One thing is clear: rather than a right to autonomy—or even a specific set of characteristics that define this term—international law in the last century has focused on the elucidation of the norm of self-determination. Selfdetermination, and its relation to autonomy and secession, is discussed at greater length below.

In sum, we found that international law has little to say as to any supposed "right" to autonomy, and that grants of "autonomy" are largely issues of domestic law. In the Transnistrian case, the Government of Moldova has proposed various plans that are effectively grants of varying levels of policymaking and regulatory autonomy, all have been rejected by the TMR. We conclude that, based on their words and deeds, the TMR's leaders seem less interested in autonomy than in full sovereignty.

Self-Determination, Sovereignty, and Secession

The norm of self-determination is not a general right of secession. It is the right of a people to decide on their culture, language, and government. It has evolved into the concepts of "internal self-determination," the protection of minority rights within a state, and "external self-determination," secession from a state. While self-determination is an internationally recognized principle, secession is considered a domestic issue that each state must assess itself.

Influential decisions and reports concerning self-determination, such as the report concerning the status of the Aaland Islands in 1921 and the Badinter Commission opinions concerning the former Yugoslavia in the 1990's, and other examples of state practice have been consistent in the view that a successful claim for self-determination must at least show that: (*a*) the secessionists are a "people;" (*b*) the state from which they are seceding seriously violates their human rights; and (*c*) there are no other effective remedies under either domestic law or international law. None of these prongs are satisfied in the case of Transnistria, with the possible exception of (*a*).

The term "people" has been generally used in recent state practice to refer to an ethnic group, or a "nation" in the classic, ethnographic, sense of the word. However there are some, such as the TMR's leadership, who suggest the term should mean something else, perhaps a group with common goals and norms. While the norm of self-determination may evolve such that a people may be more readily identified as merely a like-minded group, we do not find that current state practice supports such a

proposition. Regardless, deciding on a single definition of the term "people" is not dispositive in this case, as none of the other requirements for external self-determination are met.

Concerning the second prong, the existence of serious violations of human rights, the argument of the Transnistrians can be organized into three main groupings: (*a*) violations of linguistic, cultural, and political rights; (*b*) the brutality of the 1992 War; and (*c*) the denial of economic rights. Taking into account the significant changes in Moldova since 1992, none of these claims is convincing today.

The actual history of Moldova since the end of the 1992 War shows that the country has improved its respect of minority rights. In contrast, the TMR has had a poor human rights record including a lack of due process, persecution of religious minorities, and retaliation against political dissenters. The 1992 War itself caused 1,000 deaths, but we found that, in light of state practice, the events of the 1992 War in and of themselves do not make a persuasive claim of secession as a legal right. If they did, the world would be rife with secessionist conflicts. Similarly, the economic rights claim, which is essentially about allocation of tax revenues, does not lead to a legal right to dismember a state. This argument is really about policy, not the form of a polity.

Finally, we note that there is a general sense among commentators, opinions, and decisions, that the human rights violations that are cited in support of a claim of secession must be ongoing violations. Although Moldova still has many possible pitfalls on its road to becoming a fully modern democratic state, it is clear that it is nonetheless traveling the road in the right direction, albeit with some fits and starts. Thus, the second prong — ongoing serious violations of human rights — is not met.

The third prong asks whether there are any other options available besides secession. This conflict has been frozen not so much because there are no other options under domestic and international law besides secession, but because the separatists have chosen to make the conflict *seem* intractable by repeatedly refusing any options short of effective sovereignty for the TMR. For example, while Moldova has sought to decrease ethnic tensions, the TMR has attempted to exacerbate them and subsequently claim that separation is necessary in order to avoid ethnic conflict and possibly genocide. Such "gaming the system" is not persuasive.

We thus conclude that there is no solid basis for a claim of secession under external self-determination. The most basic requirements for a legal claim are not met.

The TMR as a De Facto Regime

If Transnistria is not a state, then what is it? We considered two issues: (*a*) the role of recognition in the process of state formation, and (*b*) whether the TMR is a *de facto* regime.

There is no obligation to recognize the TMR, even if it does have effective control of territory. Rather, it is likely that the forcible acquisition of territory, the ongoing objections by the pre-existing state, Moldova, and

the evident reliance of the TMR on military, economic, and political support from Russia for its survival argue *against* recognition and *for* nonrecognition in this case. In similar cases the Security Council and/or the General Assembly call on UN member states not to recognize such seceding entities.

Inasmuch as the TMR has effective control over Transnistria but is not recognized, the TMR can best be understood by using the doctrine of *de facto* regimes. Such *de facto* regimes are treated as partial subjects of international law. Their unique status does give rise to certain rights and responsibilities, primarily related to acts required for the support and well-being of the population. It may conclude agreements that are held at a status below treaties. Besides the right to act in order to support its population, a *de facto* regime may also be held responsible for breaches of international law.

While the *de facto* regime thus has certain rights and responsibilities, the acts of *de facto* regimes have uncertain legal effect. Acts of such a regime may become invalid with the disappearance of the regime, for instance, if the territory is reabsorbed into the parent state. However, the reintegrated state after a failed *de facto* regime may be held liable for the acts of the *de facto* regime that were part of the normal administration of the territory based on the assumption that such acts were neutral and that the state would probably have undertaken similar such acts. If, on the other hand, the *de facto* regime becomes a state, then its acts will be binding on the new state.

The TMR and the Conversion of Property in Transnistria

At the heart of the dispute between the Government of Moldova and the TMR's leadership is the issue of the control of the economic assets of Transnistria. Does the TMR have the right to convert the property in its area of effective control? If the two parts of Moldova are reintegrated, must these decisions of the TMR be respected?

We used two theoretical frameworks to answer these questions. The first, the concept of *de facto* regime, was discussed above. The second is an analogy to the international law of the administration of occupied territories, the most complete statement of which is found in the Fourth Geneva Convention. We use these rules only by analogy as one might argue that the TMR actually is not bound by the Fourth Geneva Convention. Nonetheless, we find the rules concerning the administration of occupied territories and those concerning *de facto* regimes to be useful, especially as they are also remarkably consistent as they both draw from the same root concepts of property rights that tap all the way down to the Roman law of *usufruct*, use of property by one who does not own that asset.

Applying the international law of *de facto* regimes, the TMR does not have the right to sell-off Moldovan state assets or any private property. Any such sales face possible challenge and repudiation should Transnistria become reintegrated into Moldova.

By not only applying the conception of the TMR as a *de facto* regime, but also by analogizing to the international law of the administration of occupied territories, we find that an occupying power or its analog: (*a*) may confiscate state property, other than real property, if it is usable for military purposes or in the administration of the territory; (*b*) may only administer non-military state real property without destroying or otherwise converting the economic value of the property; and (*c*) may not confiscate private property unless it is war materiel.

Based on the foregoing, the TMR's privatization program is thus exceedingly difficult to justify. Any private party taking part in this program as a purchaser consequently does so at its own risk.

Third-Party States and Secessionist Movements

The third and final main legal issue we consider is the role of "third-party" states. States have a basic duty not to intervene or otherwise interfere with the resolution of an internal conflict within another state. Under circumstances where self-determination or, more clearly, external self-determination is implicated, or where the Security Council finds that a conflict has become a threat to international peace, then third-party states may have more freedom of action concerning the conflict. This fundamental norm of non-intervention is linked with concepts of sovereignty, self-determination, and peaceful coexistence.

The role of third-party states is especially important in this case as Russia and Ukraine have taken on the role of "guarantor" states, states that have a special interest in ensuring an end to the conflict and formally commit to devoting resources to conflict resolution. Being a guarantor puts a state into a position in which it becomes involved in an ongoing crisis in another country, but that state must nonetheless respect international law in its actions. The report considers the actions of Russia and Ukraine in light of these rules of conduct.

Russia

Russia, not least because it maintains troops in Transnistria, is not only a guarantor, but a key player in the conflict. We consider four main issues: (*a*) the activities of the Russian Army and other organs of the Russian Federation in Transnistria; (*b*) economic pressure by the Russian Federation on Moldova; (*c*) ties between the TMR leadership and Russian leadership; and (*d*) the general diplomatic stance of the Russian Federation.

The role of the Russian Army can be split into two phases: assistance during the 1992 War and ongoing activities, including maintenance of arms stockpiles in Transnistria. The Russian 14th Army played a decisive role in the 1992 War by intervening in the fighting on behalf of the separatists. Despite treaty promises to demobilize and repeated Moldovan requests that Russia remove its troops from Transnistria, the troops remain. Consequently, they prop up the viability of the TMR and make reintegration

more difficult. They also provide materiel, expertise, and other support to the TMR on an ongoing basis.

Similarly, the Soviet-era arms stockpile under control of the 14th Army has been used to support the TMR both directly and as a source of revenue through joint Russian-TMR sales of army materiel on the world market. Moldova thus wants the immediate removal of the weapons stockpiles. Russia has so far refused to remove the stockpiles (or the troops) until there is a comprehensive political settlement and has also argued that the Transnistrians will not let them remove the arms.

Besides the use of the army to either hamper the Moldovans or assist the TMR, the second main issue is that Russia has also used economic pressure and economic assistance as a carrot and stick. Economic pressure is generally not barred by international law. However, such pressure on a state or assistance to separatists may make the third-party state liable under the law of state responsibility if its pressure would either frustrate Moldova's sovereign privileges or would breach one of the third-party state's pre-existing commitments to Moldova.

In considering the present situation, there are four areas of particular interest: (*a*) the use of energy prices as a carrot or a stick; (*b*) the increased use of tariff barriers against Moldovan goods; (*c*) economic assistance to the TMR; and (*d*) the shared economic interests of Russian and Transnistrian elites. Taken as a whole, there is a significant intervention on behalf of the TMR.

On the third issue, the ties between TMR and Russian leadership, there is ample circumstantial evidence. Smirnov, Minister of Justice Balala, and Chief of Internal Security Vladimir Antufeyev all arrived in Moldova at the start or since the start of the separatist crisis. The TMR's ruling elite is largely Russian and, to a lesser extent, Ukrainian, and have Russian citizenship. They have been granted Russian nationality. Certain members came to the TMR from senior positions in the Russian government, particularly the Russian parliament (the "Duma") and the Russian Army.

Finally, the various activities described above—the economic pressure, the military assistance to the TMR, the energy politics—need to be understood in light of the constant Russian rhetoric in favor of the TMR and critical of Moldova. While we do not contend that any single activity described could lead to state responsibility (although the troop situation may rise to that level) we believe that these acts seen as a whole, combined with constant Russian statements supporting the TMR and criticizing Moldovan efforts at reintegration, form a compelling picture of inappropriate intervention by Russia into the domestic affairs of Moldova.

Ukraine

Due to its common border with Moldova—and particularly with Transnistria—as well as the significant ethnic Ukrainian population in Transnistria and throughout Moldova, Ukraine is a key stakeholder in the Transnistrian conflict. Ukraine has been critical of Transnistrian separatism and has advocated the complete withdrawal of Russian troops, but has also

been perceived (rightly or wrongly) as allowing smuggling through its territory and possibly being open to relations with the TMR. Although Ukraine has acted in many ways as a counterbalance to Russian influence in Transnistria, its attentions have often been viewed by the Moldovans with a mixture of hope and suspicion.

Ukraine has made what may be a good faith effort at plotting a path towards a solution of the crisis; however an actual final plan needs to be seen before its legal implications can be assessed. The stricter border controls that are currently being implemented are a necessary, though not conclusive, step in resolving the Transnistrian crisis. Now that Ukraine has become a more active participant in the Transnistrian crisis, its actions will need to be monitored, as have those of Russia and Moldova, by the various stakeholders.

Conclusions

The report thus concludes:

Concerning the Status of the TMR. Attempted secessions are largely viewed as domestic affairs that need to be resolved by the state itself. There is no right to secede as a general matter. At most, secessions may be accepted in cases where a people have been oppressed and there is no other option for the protection of their human rights. In light of these rules, the TMR has not made a legally sufficient case that it has a right to external self-determination or secession.

Consequently, the effective control of the TMR of the Transnistrian part of Moldova is that of a *de facto* regime and may be viewed as analogous to control by an occupying power. The TMR is thus limited as to what it may legally do with the territory it administers.

Concerning the Conversion of Property by the TMR. The law of occupation recognizes that the occupying power may, as a matter of fact, control the economic resources within a territory but, as a matter of law, the rightful owners are the previous owners. The final disposition of the property is not decided by the current effective control by the occupier and as such, the occupier has the legal duty not to destroy the economic value of the property. Any economic activities undertaken jointly with the separatists or insurgents by another party are at the peril of that party. There is no comfort that such activities will be sanctioned after the final resolution of the separatist conflict and they may, in fact, be "unwound."

In light of the rules governing de facto regimes and also the law of occupation, the TMR's privatization program can leave investors with no confidence that these transactions would be enforced if the TMR is reintegrated into Moldova.

Concerning the Responsibilities of Third-Party States. Interventions by third parties are not favored and are assessed in relation to the norms of nonintervention set out in numerous global and regional treaties and legal documents. Sovereignty requires that a state's wishes concerning affairs

within its own territory be respected up to the point that some other core interest of the international system is implicated. Thus, for example, the garrisoning of troops on foreign soil is not allowed if the host state requests that the troops leave. Russia's activities concerning the Transnistrian situation, particularly the intervention of the 14th Army on behalf of the separatists, the ongoing military assistance to the TMR, the economic support of the TMR, and effectively bargaining on behalf of the TMR using energy process and other levers of power against Moldova, leads to credible claims of state responsibility on the part of Russia for the continuing separatist crisis and its proximate results.

Similarly, in light of the experience with Russia, Ukraine's increased participation in the conflict should be monitored.